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Nos. 92-848 and 92-879

In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, ET AL., PETITIONERS

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

BELLSOUTH CORPORATION

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the standard set out in Section VIII(C) of the *AT&T* consent decree governs motions for modification of the line-of-business restrictions imposed on the Bell Operating Companies (BOCs) by the consent decree, where the motion for modification was made by the BOCs and is supported by the United States, but is opposed by AT&T.

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OPINION BELOW

The opinion of the court of appeals (92-848 Pet. App. 1a-41a) is reported at 969 F.2d 1231.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1992. On October 14, 1992, the Chief Justice

extended the time for filing a petition for a writ of certiorari to and including November 20, 1992. The petition in No. 92-848 was filed on November 16, 1992, and the petition in No. 92-879 was filed on November 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The 1982 consent decree entered in the government's antitrust case against AT&T (which is sometimes referred to as the "MFJ," for "modification of final judgment")[1] required divestiture of the Bell Operating Companies (BOCs) from AT&T. It also imposed "line-of-business" restrictions and other obligations on the divested BOCs. The line-of-business restrictions generally prohibited the BOCs from engaging in businesses other than local exchange telephone service. The BOCs were specifically prohibited from providing "interexchange telecommunications services" (which includes "long distance" service) and from providing "information services" (such as LEXIS). The BOCs were also specifically prohibited from manufacturing or providing certain types of equipment. 552 F. Supp. 131, 227-228, 231 (D.D.C. 1982). In 1987, the district court removed the restriction on nontelecommunications businesses and modified the information services restriction. In 1991, following a remand by the District of Columbia Circuit, it removed the information services restriction altogether. The bar

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[1] *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

to providing interexchange services and the equipment restrictions remain in effect.

The decree provision barring the BOCs from providing "interexchange telecommunications services" not only covers traditional "long distance" services, such as AT&T and MCI provide, but also prohibits the BOCs from providing any "telecommunications services" that cross the boundaries between the "exchange areas" or "LATAs" defined pursuant to the decree.[2] In order to complete interexchange calls, therefore, both the communication between the parties and the associated "network control signaling"[3] must be switched between BOC networks and interexchange carrier networks. An "in-band" telecommunications system uses the same

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[2] See MFJ § II(D)(1), 552 F. Supp. at 227; MFJ § IV(K), 552 F. Supp. at 229; MFJ § IV(G), 552 F. Supp. at 229. Because the term "exchange area" has a variety of meanings in the telecommunications industry, the term "LATA" (local access and transport area) was used to refer to the exchange areas established pursuant to the decree. See *United States* v. *Western Elec. Co.*, 569 F. Supp. 990, 993-994 n.9 (D.D.C. 1983). Each BOC provides local telephone service in a region comprised of multiple LATAs, but a BOC may not provide interexchange telecommunications services even within the region it serves.

[3] "Network control signaling" controls the operation of telephone network switches to set up, maintain, and disconnect the circuit used for a call; it also provides billing information for carriers. Network control signaling indicates, for example, the initiation of a call, the calling number, the number dialed, whether the phone is ringing or "busy" at the called station, the completion of the connection to the called station, and the disconnection when the parties hang up. 92-879 Pet. App. 6a, 49a.

facilities (lines and switches) to transmit both the communications and the network control signaling. 92-848 Pet. App. 6a. In contrast, a more efficient common channel signaling ("CCS") system transmits network control signaling over a data network separate from the communications channel.[4] Therefore, with a CCS system it is not necessary to transfer network control signaling between BOCs and interexchange carriers at the same locations where the communications themselves are transferred, as it is with an in-band system.

Several years ago, the BOCs began to deploy "SS7-CCS," a specific CCS protocol, within their networks and to use it for a variety of functions. Most interexchange carriers also are deploying SS7 in their networks or plan to do so in the near future. 92-848 Pet. App. 8a, 47a & n.6. A CCS system can be used to some extent within a BOC's network or an interexchange carrier's network even if only in-band signaling is transmitted from one to the other. In order to obtain the full benefits of CCS for interexchange calls, however, the BOCs and the interexchange carriers must interconnect their CCS networks. Interconnection between a BOC's CCS network and an interexchange carrier's CCS network requires that the BOC and the interexchange carrier each have special CCS switches, called "Signaling

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[4] Some of the advantages of CCS over in-band signaling are that CCS permits faster set-up of calling circuits and transmits more network control information. 92-879 Pet. App. 7a.

Transfer Points" (STPs).[5] In planning for CCS, the BOCs determined that the cost to them and to the interexchange carriers of implementing CCS could be minimized if, instead of having the BOCs and interexchange carriers install STPs in every LATA, the BOCs and the interexchange carriers interconnected their CCS networks using fewer STPs. To do this, the BOCs proposed to carry CCS network control signaling across some LATA boundaries before delivering it to interexchange carriers.[6] 92-848 Pet. App. 12a-13a n.11.

2. In industry CCS planning meetings, AT&T asserted that the BOCs would violate the decree by transporting CCS signaling across LATA boundaries; that is, AT&T argued that the BOCs would engage in prohibited interexchange service by doing so. The BOCs disagreed. C.A. App. 450. Therefore, U S West, later joined by the other BOCs, moved in the district court under Section VII of the decree[7] for a declaratory ruling that the decree does not require the BOCs to install a CCS interface in each LATA. In the alternative, the BOCs moved under Sections

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[5] STPs are deployed in pairs to improve network reliability. If there is a problem with one of the pair, traffic can be routed automatically to the other. 92-848 Pet. App. 7a n.5.

[6] Under their proposal, the BOCs would continue to deliver end user communications associated with CCS signaling to interexchange carriers within the originating LATAs.

[7] Section VII permits "any of the parties to [the decree] or, after [divestiture], a BOC to apply to [the district c]ourt at any time for * * * orders * * * for the construction or * * * modification of any of the provisions [of the decree]." 552 F. Supp. at 231.

VII and VIII(C) of the decree[8] for a waiver, *i.e.*, a modification of the decree, to permit them to use centralized STPs for transferring CCS network control signaling between BOCs and interexchange carriers.[9]

The United States took the position that the decree required the BOCs to deliver network control signaling to the interexchange carrier in the LATA where a call originates and, thus, that the BOCs would need a waiver.[10] The United States further concluded that such a waiver should be granted because it would serve the public interest in competition. That conclusion was based in part on the

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[8] Section VIII(C) requires the court to remove a Section II(D) line-of-business restriction "upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231.

[9] The interexchange carriers that filed responses in the district court opposed the declaratory ruling. Three interexchange carriers, AT&T, MCI, and ALC, also opposed the requested waiver. Three smaller interexchange carriers, MidAmerican, Teleconnect, and US Sprint, along with CompTel, an association of interexchange carriers, urged the court to grant a waiver, but proposed additional conditions. The interexchange carriers supporting a waiver argued that it would expedite the deployment of SS7 and that implementation of CCS interconnection in every LATA would be too costly for the smaller interexchange carriers.

[10] Unlike AT&T, the United States did not contend that BOCs transport of network control signaling across LATAs for delivery to interexchange carriers would be "interexchange telecommunications service." But the government contended that it would involve "exchange access service" and that Section IV(F) of the decree required exchange access service to be provided in the originating LATA.

failure of the interexchange carriers opposing the motions to identify any anticompetitive effect that would be likely to result from centralized CCS access service. Moreover, centralized CCS interconnection would be less costly to BOCs and to interexchange carriers than establishing STP pairs in all LATAs and thus would facilitate the deployment of CCS.

3. While the CCS waiver motions were pending in the district court, the D.C. Circuit decided the "Triennial Review" appeals. *United States* v. *Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.), cert. denied, 111 S. Ct. 283 (1990). The court of appeals affirmed the district court's denial of the BOCs' motions for removal of the decree's interexchange services and equipment manufacturing restrictions. The court of appeals also held that because the United States supported and AT&T did not oppose the BOCs' motions for removal of the information services restriction, neither the special standard of Section VIII(C) nor the stringent "unforeseen conditions" standard articulated in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932), applied to those motions. Rather, the court of appeals held, the common law "public interest" standard incorporated in Section VII of the decree applied. 900 F.2d at 305-307. Under that standard, the district court was to approve the proposed modification if it was "within the *reaches* of the public interest," *id.* at 309 (citations and internal quotation omitted), *i.e.*, unless it "would be certain to lessen competition," *id.* at 308.[11]

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[11] The court of appeals remanded the information services motions for reconsideration under the public interest standard, and the district court granted those motions, removing the

Because the BOCs sought removal of the equipment manufacturing restrictions—relief which the United States supported and AT&T opposed—solely under Section VIII(C), the court of appeals did not determine what standard would have applied to motions for such relief under Section VII. In a footnote to its holding that the United States may move for decree modifications only under Section VII, however, the court of appeals commented:

> The Government *opposed* the modification sought in *Swift*, and therefore it is not at all clear to us that the stringent, so-called "unforeseen conditions" test of *Swift* would apply to motions brought by the *DOJ* under section VII. Since the DOJ is, as plaintiff, the "Prime Mover" of this case, it may well be that modifications it seeks should be evaluated under a standard somewhat more akin to the "public interest" test of the Tunney Act. Still, it is true that the line of business restrictions were part of what AT&T bargained for in the original decree, therefore suggesting that the modification requests that AT&T opposes should perhaps be viewed differently from those that all the parties agree to. We need not pass judgment on this issue here since the DOJ brought no motion under section VII.

900 F.2d at 294-295 n.12.

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information services restriction altogether. *United States* v. *Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991). Appeals from that decision are pending in the D.C. Circuit, *United States* v. *Western Elec. Co.*, No. 91-5263 (argued Dec. 1, 1992).

4. After the court of appeals rendered its Triennial Review Decision, the district court denied the BOCs' motions in this case. 92-848 Pet. App. 44a-53a, 54a-56a. The district court first held that "section IV(F) of the decree requires that network control signals be delivered within the originating LATA" and that "the transport of signaling messages over LATA boundaries is an interexchange function." *Id.* at 54a.

The district court also denied the BOCs' alternative request for a waiver. It declined to apply the common law public interest standard applicable to uncontested decree modifications, although the government supported the BOCs' motions, because AT&T opposed them. 92-848 Pet. App. 55a n.1. In denying the waiver under the Section VIII(C) standard, the district court did not identify any specific competitive risk posed by the BOCs' proposal. It viewed the proposal, however, as a step in "a piecemeal dismantling of [the interexchange] restriction," *id.* at 55a, and concluded that the Department of Justice "ha[d] not furnished economic evidence or predictions of market behavior adequate to persuade either [the district c]ourt or the Court of Appeals that entry of the Regional Companies into the interexchange market is now justified." *Ibid.*

5. The BOCs appealed, and the United States, as appellee, also urged reversal. The government contended that the public interest standard—that is, the standard that usually applies where the government and an antitrust defendant that is subject to a restriction imposed by a consent decree agree on a modification—should apply to BOC motions for modification of the MFJ line-of-business restrictions

to which the United States consents, since only the BOCs are restrained by those restrictions.[12]

a. A divided panel of the D.C. Circuit affirmed. 92-848 Pet. App. 1a-41a. The majority (Judge Silberman, joined by Judge Sentelle) held that "the CCS waiver must be judged according to section VIII(C)'s standard, for whenever a modification implicates the line-of-business restrictions and is contested by *any* of the parties to the decree, the section VIII(C) test governs." *Id.* at 23a.[13] The majority observed that the line-of-business restrictions were intended to prevent the BOCs' "return" to the interexchange market "with the same sort of local monopoly leverage that caused the government to bring suit against AT&T in the first place." *Id.* at 17a. Thus, it rejected the argument "that AT&T has no interest under the decree" in the line-of-business restrictions. *Id.* at 16a. In the majority's view, "[t]he decree is not ambiguous; it gives AT&T the right, as a party to the decree, to assert its objection to the BOCs' proposal and thus to invoke section VIII(C)." *Id.* at 22a. The majority added that "[u]ntil this case, the government has never even suggested that the decree could be

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[12] The BOCs also argued that the district court had erred in concluding that their proposal did not satisfy the Section VIII(C) standard. The United States did not raise that issue on appeal.

[13] The court of appeals upheld the district court's conclusion, which the parties had not challenged on appeal, that the proposed decree modification requires a waiver of a line-of-business restriction. 92-848 Pet. App. 12a-13a.

read otherwise." *Id.* at 22a-23a; see also *id.* at 15a, 22a, 24a.[14]

The majority also affirmed the denial of the BOC motions "on this record" under Section VIII(C), viewing the BOCs' proposal as a request "to take a piece of the interexchange market completely out of competition." 92-848 Pet. App. 24a-29a.

b. Judge Williams dissented. The majority's interpretation of the decree, he emphasized, allows the Section II(D) line-of-business restrictions to operate as "a market-allocation agreement between the separate firms into which the Bell System was split" by the decree, 92-848 Pet. App. 30a, "*i.e.*, a *per se* violation of the Sherman Act." *Id.* at 34a. Judge Williams pointed out that AT&T's opposition to removal of the line-of-business restrictions is "at least as easily chalked up to fear of enhanced competition as to any genuine concern for its reduction." *Id.* at 39a. No antitrust injury to AT&T can flow from entry itself; thus, "[t]o read the decree as assigning AT&T special rights against modifications of the line-of-business rules is to allow it just the sort of preemptive strike against competition that the [Supreme] Court rejected in [*Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986).]" 92-848 Pet. App. 39a.

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[14] The court found further support for its conclusion in prior D.C. Circuit decisions treating motions supported by the United States and opposed by AT&T as "contested," although it recognized that these decisions "cannot be said to have *held* that AT&T's opposition makes a requested modification contested—because the point was not directly controverted." 92-848 Pet. App. 22a-24a.

The court, Judge Williams said, "should be slow to give the section [II(D)] a role in such obvious tension with the purposes of the antitrust laws." 92-848 Pet. App. 34a. Moreover, he added, the majority's anticompetitive holding was not supported by the language or history of the decree or by general equitable principles. *Ibid.* In his view, neither Section VII nor Section III addresses the question whether Section VIII(C) or the public interest standard applies to line-of-business modifications that AT&T opposes. *Id.* at 31a-33a. Under general principles of contract law, "each obligation runs only to those whom it was intended directly to benefit"; it "will not run automatically to every party that might incidentally derive a benefit." *Id.* at 37a. Moreover, Judge Williams added, the parties' contemporaneous statements did not support the majority's view that AT&T had a protected interest in the line-of-business restrictions. To the contrary, they indicated "that Bell was at least ambivalent and probably hostile to the [line-of-business] restrictions." *Id.* at 38a. Accordingly, Judge Williams concluded that the case should be remanded to the district court for application of the public interest standard. *Id.* at 41a.

Judge Williams did not address the majority's holding that the proposed modification did not satisfy the Section VIII(C) standard. He explained, however, that the BOCs did not seek to expand their monopolies into the competitive interexchange market as the majority believed. Rather, they "propose only to change the *means* of implementing the monopolies granted to them by state law." 92-848 Pet. App. 40a.

ARGUMENT

The court of appeals erred by holding that AT&T's objection required that the BOCs' motions for modification of the line-of-business restrictions be reviewed under Section VIII(C) of the decree. In our view, such motions should be reviewed under the public interest standard of Section VII if the government consents to a modification. However, we are not persuaded that this case warrants this Court's review. Because it involves the interpretation of a particular antitrust decree, there is no conflict among the circuits. In addition, the decision below may have limited significance because this case does not involve a motion by the United States to modify a decree restriction, and the lower courts might not apply Section VIII(C), which speaks of a "petitioning BOC," when the government petitions for modification. Moreover, there is no pressing need at this time for review of the question presented.

1. In our view, the court of appeals erred by holding that Section VIII(C) of the decree, rather than the public interest standard, governs BOC motions to modify line-of-business restrictions that are supported by the government, if AT&T objects. Under established law, as the court of appeals has recognized, defendants' uncontested motions to modify antitrust decree restrictions must be approved if they fall "within the reaches of the public interest." See 900 F.2d at 305-309; *United States* v. *Bechtel Corp.*, 648 F.2d 660 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). The public interest standard, as the court of appeals also recognized, must be deemed to have been incorporated in Section VII of the decree,

United States v. *Western Elec. Co.*, 900 F.2d at 305-307, for courts presume that the parties "intended to adopt 'the ordinary substantive * * * standards that attend decree modification[s],' " *id.* at 307 (quoting *United States* v. *Western Electric Co.*, 894 F.2d 430, 436 (D.C. Cir. 1990)).

The court of appeals nevertheless ruled that the BOCs' motions—which the government supported—were governed by the specialized standard of Section VIII(C) of the decree. But Section VIII(C) was added to the decree prior to its entry at the behest of the district court to deal with BOC motions that were opposed by the government. Having ruled, over the government's objection, that the BOCs should be allowed to provide certain services in competitive markets, the district court wished to ensure that similar BOC requests in the future would not be subjected to the stringent standard of *United States* v. *Swift*, *supra*. *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. at 195 n.266. The *Swift* standard, which generally governs a defendant's motion to modify an antitrust decree over the government's opposition, requires the defendant to make a "clear showing of grievous wrong evoked by new and unforeseen conditions." 286 U.S. at 119. To avoid application of that standard, which would make it extremely difficult to remove a restriction over the government's objection, the district court required the parties to add Section VIII(C), which sets out a standard that is demanding, but not as difficult to satisfy as the *Swift* standard: it provides that the line-of-business restrictions "shall be removed upon a showing by the petitioning BOC that there is no

substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231.

The court of appeals' conclusion that Section VIII(C) controls here, even though the government consents to the modification sought by the BOCs, stems from an unusual aspect of this case: the defendant that agreed to the line-of-business restrictions subsequently split into eight successor firms, whose present interests do not coincide on this point. The BOCs, and not post-divestiture AT&T, are properly viewed as the successors to the Bell System with respect to the line-of-business restrictions. Only the BOCs are bound by those restrictions; post-divestiture AT&T is not so bound and, indeed, competes in markets from which the decree bars the BOCs. Thus, the BOCs—and not AT&T—stand in the position of the antitrust defendant for purposes of determining whether a modification of the restrictions applicable to them is consensual.

The decree's history does not support the court of appeals' conclusion that the parties intended to depart from the usual principles governing modification of consent decrees and to give the opposition of a private defendant not subject to the decree restrictions the same weight as opposition by the government plaintiff. The United States originally sought the line-of-business restrictions and the court approved them to protect competition from possible BOC abuses of monopoly power in the local exchange markets. As Judge Williams stated, the defendant Bell System "was at least ambivalent and probably hostile to the restrictions." 92-848 Pet. App. 38a; see

also 552 F. Supp. at 186 n.227 ("the Department is the principal proponent of the restrictions on the Operating Companies. AT&T has generally taken the stance that it agreed to these restrictions as part of the overall settlement"). There is no evidence that the government or the pre-divestiture Bell System (which included the BOCs) desired to afford post-divestiture AT&T special rights to oppose modification of restrictions that did not apply to it, much less evidence that there was a meeting of the minds on the point.[15]

Post-divestiture AT&T, of course, has an economic interest in maintaining the restrictions imposed on the BOCs to minimize the risk that the BOCs might use their local monopolies to impede competition in other markets. In that respect, however, AT&T stands in the same position as other interexchange carriers. Furthermore, AT&T and the other competitors in markets from which the BOCs are barred may benefit from the anticompetitive effects of continuing restrictions on BOC entry that no longer serve the public interest in competition. So in this case, AT&T and MCI, the largest long distance companies, opposed the waiver request, while smaller long distance companies that could have benefited from the BOCs' proposal supported the waiver request. In short, although the district court has

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[15] The court of appeals noted that "section III [of the decree] treats AT&T as a formal party to the *entire* decree, with specific authority under section VII to demand enforcement of *any* section of the agreement." 92-848 Pet. App. 18a. Section III, however, says nothing about the standard governing decree modifications. See *id.* at 32a-33a.

properly allowed interested persons to express their views on proposed decree modifications, it is the United States that represents the public interest in competition in government antitrust proceedings, see *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 116-117 (8th Cir.), cert. denied, 429 U.S. 940 (1976), subject to judicial review under the public interest standard.

2. Despite our disagreement with the court of appeals' conclusion, we do not urge the Court to grant the petition. The court of appeals' holding was based squarely on its interpretation of the terms of the MFJ. See 92-848 Pet. App. 18a ("section III treats AT&T as a formal party to the *entire* decree, with specific authority under section VII to demand enforcement of *any* section of the agreement"). Accordingly, it establishes no clear precedent for other multiparty decrees. Moreover, the problem in this case results from the unusual fact that the original defendant was split into eight successor firms, seven of which are bound by the line-of-business restrictions and one of which is not. Petitioners have cited no other case in which a successor of a defendant that is not restricted by the terms of a consent decree objected to the lifting of a restriction placed on another successor, and we are aware of no such case. Thus, this case presents no conflict with the law of any other circuit and no legal question of general applicability. Nor does the case present an important constitutional issue.

Moreover, the scope of the court of appeals' ruling is unclear. The court of appeals limited its holding to

modifications of the decree's line-of-business restrictions, expressly declining to decide what standard would apply to modifications of other provisions. See 92-848 Pet. App. 23a n.17. Moreover, this case did not involve a motion by the United States to modify the decree. The court of appeals held in the Triennial Review decision that Section VIII(C) applies only to BOC motions, as the language referring to a "petitioning BOC" states; the United States may move for decree modifications only under Section VII. 900 F.2d at 294. Although we believe that the public interest standard should apply whether the United States supports a BOC motion or files its own motion, the decision below did not decide what standard applies to government motions. See *Id.* at 294 & n.12; 92-848 Pet. App. 9a-11a. If the court of appeals were to hold the public interest standard applicable where the United States moves under Section VII for a line-of-business modification (sought or consented to by the BOCs)—as we submit it should—the holding below would not significantly impede the govern-ment's ability to carry out its responsibility to ensure that the decree serves the public interest in competition.

Moreover, while there is no doubt that the decree at issue significantly affects competition and innovation in telecommunications and related industries, and while unnecessary restrictions on vertical integration and entry into important and technologically critical markets may undercut the public interest in competition, the direct effect of the judgment in this case is relatively limited, as a practical matter. That is, an issue warranting review by this Court might be presented if, for example, the government moved for

modification of the equipment manufacturing restrictions, and AT&T were able to block the modification under Section VIII(C).[16] The question of what standard applies when the government seeks to modify a line-of-business restriction would then be presented, and in a context where competition in an important market might well be affected. But the issue directly affected by the judgment in this case is whether the BOCs may carry network control signals across LATA boundaries, a technical issue of limited practical importance in comparison with the other issues that may arise under the decree. Moreover, while this case has been pending, the BOCs

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[16] Although both the public interest standard and the Section VIII(C) standard focus on competition, they differ significantly. Under the public interest standard the Department of Justice is required to present its competitive analysis to the court, interested persons may comment, and the Department responds. The court then reviews the record to ensure that the Department has not breached its duty to the public in consenting to the modification. But the court's review is limited, and it must approve all modifications that fall within the "reaches of the public interest," 900 F.2d at 307-309; see also *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975). By contrast, under Section VIII(C), the BOCs have the burden of proving a negative—that "there is no substantial possibility that [the BOC] could use its monopoly power [in local exchange service] to impede competition in the market it seeks to enter." 900 F.2d at 295. The district court conducts a de novo inquiry and the court of appeals may reverse a refusal to modify the decree only if the district court's findings are clearly erroneous or based on legal error. See *id.* at 293-294. Thus, whether Section VIII(C) applies may be determinative.

have installed STPs in nearly all of the LATAs, so a decision by this Court would have very little practical impact on the dispute that gave rise to the case. Accordingly, while review of the question presented might be warranted in some future case, it is not warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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